

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

Vienna, 4 February 2020

Note: Subsidies to Coal Electricity Production under State Aid Scrutiny**I. Analysis of Subsidies published by Secretariat**

After publishing a draft in March 2019, the Energy Community Secretariat published an “Analysis of Direct and Selected Hidden Subsidies to Coal Electricity Production in the Energy Community Contracting Parties” in June 2019 (hereinafter “the Study”). The Study analyses the amount of direct and hidden subsidies to support the coal sector and shows the impact of these subsidies on the profitability of thermal power plants and the price of electricity to supply households and industry. It focuses on the period 2015-2017 and covers Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia, Serbia and Ukraine.

The Study deals with two sets of subsidies:

(i) Direct subsidies which is based on the definition of subsidies provided by Article 1 of the WTO Agreement on Subsidies and Countervailing Measures (“any financial contribution by a government, or agent of a government, that confers a benefit on its recipients”). These subsidies are classified in three categories:

- fiscal-type subsidies (e.g. direct funding from state budget and subsidies derived from the writing-off and reprogramming of arrears to the budgets and public funds, government loans, debt write-offs or repayment of loans from the state budget on the basis of issued loan guarantees, lowering of the fees payable to the state for used resources and VAT exemption);
- public finance support subsidies (e.g. provision of state guarantees for foreign investment loans, loans extended by government-controlled institutions and loans and grants provided by international organisations to business entities involved in electricity generation from coal);
- and State Owned Enterprises (SOE) investment support subsidies (e.g. direct investment of state enterprises in capital, regular advances on production, extending loans and tolerance for non-payment of electricity bills by entities in the coal production sector).

(ii) Hidden subsidies are defined as exemption or waiver of otherwise reasonable costs of power producers, due to their status and legal framework, providing to it a competitive advantage in the respective market which is not obvious, such as operation at a low or negative level of profitability and non-payment of CO2 emissions or any other externalities.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

II. State aid scrutiny

As has been pointed out above, the Study focuses on the analysis of so-called subsidies as defined by the WTO and their impact on the profitability of plants and the electricity price. It explicitly states that it does not assess whether these measures constitute State aid in the sense of Article 18 of the Energy Community Treaty and whether such measures are compatible.

Therefore, in the following, the Secretariat provides a preliminary assessment of the direct subsidies identified by the Study (as listed in Annex 1 of the draft report of March 2019 “Overview of Direct Subsidies per Contracting Party and Type of Subsidies”) under the State aid *acquis*. The aim of this analysis is to identify specific potential State aid measures in each Contracting Party and refer them for further assessment to the competent national State aid authority. The Secretariat remains open for cooperation and assistance in the framework of Article 2 of the Dispute Settlement Procedures when assessing these measures in further detail.

Article 18(1)(c) of the Treaty provides that any public aid which distorts or threatens to distort competition by favouring certain undertakings or certain energy resources shall be incompatible with the proper functioning of the Treaty, insofar as it may affect trade of Network Energy between the Contracting Parties. Article 19 of the Treaty explicitly provides for an obligation of the Contracting Parties to ensure that with regard to public undertakings and undertakings, to which special or exclusive rights have been granted, the principles of the Treaty, including the rules on State aid, are upheld. The elements of the definition of State aid are the following:¹

- i. there must be a benefit or advantage;
- ii. which is granted by the State or through State resources;
- iii. which favours certain undertakings or certain energy resources (selectivity);
- iv. which is liable to distort competition and may affect trade between Member States (in the case of the Energy Community, trade of Network Energy between the Contracting Parties).

Support measures which fall under this definition of State aid are generally prohibited. However, Article 107(2) and (3) TFEU (which corresponds to Article 87 of the EC Treaty, as enshrined in Annex III to the Energy Community Treaty) provide for limited grounds of compatibility of such aid. The assessment and decision on compatibility or non-compatibility is within the competence of the national State aid authority. However, in this context, only Article 107(3)(c) and (e) constitute potential grounds for compatibility. While on the basis of Article 107(3)(e) TFEU, according to Council Decision 2010/787/EU on State aid to facilitate the closure of uncompetitive coal mines, only aid to alleviate the social and regional consequences of the closure of coal mines is permitted, the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (“EEAG”) specify grounds of compatibility under Article 107(3)(c) TFEU. However, compatibility of State aid to coal needs to be assessed on a case-by-case basis by the competent State aid authority and can only be accepted under limited circumstances.

¹ See Article 18(1)(c) of the Treaty or Article 107 TFEU.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

III. Specific measures

A. Bosnia and Herzegovina

(a) Failure to collect tax, social security contribution and VAT arrears

The failure by the FBiH to collect tax and social security contribution arrears and by BiH to collect VAT arrears from State coal mines potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.² This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.³

As reported by the Study on the basis of official data provided by the Tax Administration, the FBiH and BiH fail to collect tax, social security contribution and VAT arrears. Tax, social security contribution and VAT constitute charges normally included in the budget of an undertaking. In fact, in this case, the state coal mines are effectively required to pay these charges, but the obligation is not enforced and, therefore, they are released from the duty to pay the arrears. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.⁴ In the case at hand, the decision not to collect the arrears must be taken by the authority responsible for the collection which is the Tax Administration of FBiH and of BiH. These authorities are part of the State's administration and their measures are therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.⁵ Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.⁶ For example, as in the case at hand, a 'shortfall' in tax and social security revenue due

² Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

³ Commission Notice on the notion of State aid (2016/C 262/1) para 68; ECJ C-172/03, *Heiser*, ECLI:EU:C:2005:130, para 36; ECJ C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598 para 38; ECJ C-126/01, *GEMO*, ECLI:EU:C:2003:622, para 28.

⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 51.

⁶ ECJ C-83/98 P, *Ladbroke Racing*, ECLI:EU:C:2000:248 paras 48-51.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

to exemptions or reductions in taxes or social security contributions granted by the State fulfils the State resources requirement.⁷

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.⁸ There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,⁹ but in the case at hand, the exemption is an *ad hoc* measure benefitting the State coal mines, which has a selective character by reserving favourable treatment for these undertakings.¹⁰

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.¹¹ A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.¹² The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.¹³ Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.¹⁴ As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Waiver of fee for exploitation of natural resources

In 2018, the Law on Charges for Exploitation of Natural Resources for Electricity Generation of the RS which required the producers of electricity from coal in RS to pay a fee of EUR 0,0031/kWh of generated electricity was amended and lowered the fee to EUR 0,0015/kWh.¹⁵ The lowering of the

⁷ ECJ C-387/92, *Banko Exterior de Espana*, ECLI:EU:C:1994:100, para 14.

⁸ ECJ C-15/14 P, *MOL*, ECLI:EU:C:2015:362 para 60.

⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 127.

¹⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

¹¹ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases 730/79, *Philip Morris*, ECLI:EU:C:1980:209, para 11; T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 80.

¹² Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 141-147; C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.

¹³ Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288, para 76.

¹⁴ ECJ C-518/13, *Eventech*, ECLI:EU:C:2015:9, para 65.

¹⁵ http://www.poreskaupravar.org/dokumenti/zakoni/Zakon-o-izmjenama-naknadama-koristenje-prirodnih-resursa-SLGL-15_16.pdf

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

fee potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.¹⁶

The lowering of a fee for the use of resources constitutes such an advantage in so far as the use of resources should normally be remunerated by an appropriate fee. Lowering this fee or applying a discount to this fee alleviates the burden normally borne by an undertaking.

(ii) Imputability to the State and State resources

The advantage is derived from amendments to a law. Since legislative power is one of the constitutional powers of a State, an aid resulting from legislative measures is necessarily imputable to the State.¹⁷

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.¹⁸ Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.¹⁹ Since the fee for using the resources forms part of the State's income, it is considered State resources.

(iii) Selectivity

A measure is selective if it generates an advantage exclusively for certain undertakings or certain energy sources.²⁰

In the case at hand, the measure is selective if the fee applies to all electricity generators and is only lowered for generators of electricity from coal. This would constitute a selective advantage for generators of electricity from coal compared to all other electricity generators.

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

¹⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

¹⁷ T-358/94, *Air France/Commission* [1996] ECR II-2109, para. 59.

¹⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 51.

¹⁹ ECJ C-83/98 P, *Ladbroke Racing*, ECLI:EU:C:2000:248 paras 48-51.

²⁰ T-55/99, *CETM/Commission* [2000] ECR II-3207, para. 39; T-152/99, *Hijos de Andrés Molina/Commission* [2002] ECR II-3049, para. 156; T-210/02, *British Aggregates/Commission* [2006] ECR II-2789, para. 105.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(c) Government guarantee for loan for Flue Gas Desulphurisation Construction at Ugljevik TPP

The project is financed by a loan from the Japanese government (Japanese International Cooperation Agency)²¹ for 30 years at an interest rate of 0.55% to MH EPS. The public guarantee covering this loan potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.²² In the same way as any other transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.²³ Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.²⁴ This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.²⁵

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.²⁶ The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.²⁷

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.²⁸ In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given

²¹ <https://www.jica.go.jp/bosnia/english/activities/activity09.html>

²² Commission Notice on the notion of State aid (2016/C 262/1) para 66; Cases C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para 60; C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, para 41.

²³ Commission Notice on the notion of State aid (2016/C 262/1) para 108.

²⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, *France v Commission*, ECLI:EU:C:2014:217, para 96.

²⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 109; C-275/10, *Residex Capital v Gemeente Rotterdam*, ECLI:EU:C:2011:814, para 39.

²⁶ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

²⁷ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

²⁸ Case C-482/99, *France v Commission (Stardust)*, ECLI:EU:C:2002:294.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:²⁹

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).
- A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.³⁰ The guarantee at stake is given by the government (i.e. the Ministry of Finance) and are therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources.³¹ The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient.³² Therefore, the guarantee at issue involves State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.³³

The guarantee at issue is granted in favour of one TPP, i.e. it guarantees performance and payment of specific obligations of the operator. The operator benefits from the guarantee insofar as it allows

²⁹ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.

³⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

³¹ Commission Notice on the notion of State aid (2016/C 262/1) para 51; Case C-83/98 P, *France v Ladbroke Racing Ltd and Commission*, ECLI:EU:C:2000:248, para 48-51.

³² Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, *Ecotrade*, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, para 137, 138 and 139.

³³ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantee favours a specific undertaking.

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(d) Investment in coal mines capital

The investment by JP EPBiH d.d. into capital of seven coal mines in FBiH potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

In order to determine whether direct investment of equity or debt capital confers an advantage, the private investor test is applied.³⁴ In short, State aid is present when an enterprise receives fresh capital under circumstances that would not have been acceptable to a private investor operating under normal market economy conditions. It therefore must be assessed whether the beneficiary enterprise could have raised the same amount of capital on the same terms in the private capital markets. In considering this question, it is necessary to consider whether under similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount.³⁵ If an injection of capital disregards any prospect of profitability, even in the long term, it is liable to be considered State aid.³⁶ The assessment whether a private investor would have entered into the transaction on the same terms will vary from case to case and needs to take into account all factors that are relevant to the transaction and its context. This includes the situation of the beneficiary undertaking and the relevant market, the liquidity of the capital, a comparison between the internal rate of return on the investment and the minimum acceptable rate for a private investor.

(ii) Imputability to the State and State resources

The investment is undertaken by JP EPBiH d.d., a company of which 90.369% are owned by the Federation of Bosnia and Herzegovina, while 9.631% are owned by private investment funds and small individual shareholders. The resources of States or of their dependent or independent, national, regional or local public institutions (“public authorities”) as well as the resources of undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence

³⁴ ECJ 234/84, *Belgium/Commission*, ECR 1986, 2236, para. 14; ECJ 40/85, *Belgium/Commission*, ECR 1986, 2321, para. 13.

³⁵ ECJ C-305/89 *Alfa Romeo*, ECR 1991 I-1603, para. 19.

³⁶ ECJ C-303/88 *ENI-Larossi*, ECR 1991 I-1433, para. 22.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(“public undertakings”), are to be seen as State resources.³⁷ Since the State is capable of directing the use of the company’s resources, they are under the control of the State³⁸ and can be considered State resources.³⁹

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.⁴⁰ There is no need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question; the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.⁴¹ Possible indicators include for example:⁴²

- The fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;
- The fact that the undertaking through which the aid was granted had to take account of directives issued by governmental bodies;⁴³
- The integration of the public undertaking into the structures of the public administration;
- The degree of supervision that the public authorities exercise over the management of the undertaking;
- Any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.⁴⁴

In the case at hand, investment occurs into seven coal mines, which has a selective character by reserving favourable treatment for these undertakings.⁴⁵

³⁷ E.g. Case C-482/99, *Stardust Marine*, EU:C:2002:294, paras. 34 *et seq.*; 248/84, *Germany/Commission*, [1987] ECR-4013, para. 17.

³⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 49; ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 38.

³⁹ See Commission Decision of 25 September 2007, *Poland*, C(2007) 4319, para. 174.

⁴⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 40; ECT C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 52.

⁴¹ Commission Notice on the notion of State aid (2016/C 262/1) para 41 *et seq.*

⁴² ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294 para 55 *et seq.*

⁴³ ECJ C-242/13, *Commerz Nederland*, ECLI:EU:C:2014:2224, para 35.

⁴⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 *et seq.*; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

⁴⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(e) Short-term loans for coal mines

Granting of short-time loans by JP EPBiH d.d. to seven coal mines in FBiH potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

The State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.⁴⁶ It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount and under the same conditions.⁴⁷ The assessment whether a private investor would have entered into the transaction on the same terms will vary from case to case and needs to take into account all factors that are relevant to the transaction and its context. This includes the situation of the beneficiary undertaking and the relevant market, the liquidity of the capital, a comparison between the internal rate of return on the investment and the minimum acceptable rate for a private investor.

(ii) Imputability to the State and State resources

The loans are granted by JP EPBiH d.d., a company of which 90.369% are owned by the Federation of Bosnia and Herzegovina, while 9.631% are owned by private investment funds and small individual shareholders. Since the State is capable of directing the use of the company's resources, they are under the control of the State⁴⁸ and can be considered State resources.⁴⁹

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.⁵⁰

⁴⁶ ECJ 67, 68 and 70/85, *Van der Kooy* [1988] ECR 219, p. 251.

⁴⁷ ECJ C-305/89, *Alfa Romeo* [1991] ECR I-1603, para. 19; T-296/97, *Alitalia I* [2000] ECR II-3871, para. 96.

⁴⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 49; ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 38.

⁴⁹ See Commission Decision of 25 September 2007, *Poland*, C(2007) 4319, para. 174.

⁵⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 40; ECT C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 52.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.⁵¹

In the case at hand, loans are given to seven coal mines, which has a selective character by reserving favourable treatment for these undertakings.⁵²

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(f) Interest-free advance payments

Granting of interest-free financing, i.e. advance payment by JP EPBiH d.d. to seven coal mines in FBiH potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Council.

(i) Advantage

Advance payments by buyer effectively constitute short-term interest free loans to the seller.

As has been pointed out above, the State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.⁵³ It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount and under the same conditions.⁵⁴ Interest-free loans confer an advantage on the beneficiary.⁵⁵

(ii) Imputability to the State and State resources

The advantage is granted by JP EPBiH d.d., a company of which 90.369% are owned by the Federation of Bosnia and Herzegovina, while 9.631% are owned by private investment funds and

⁵¹ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

⁵² Commission Notice on the notion of State aid (2016/C 262/1) para 126.

⁵³ ECJ 67, 68 and 70/85, *Van der Kooy* [1988] ECR 219, p. 251.

⁵⁴ ECJ C-305/89, *Alfa Romeo* [1991] ECR I-1603, para. 19; T-296/97, *Alitalia I* [2000] ECR II-3871, para. 96.

⁵⁵ GC T-214/95, *Vlaams Gewest*, ECLI:EU:T:1998:77.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

small individual shareholders. Since the State is capable of directing the use of the company's resources, they are under the control of the State⁵⁶ and can be considered State resources.⁵⁷

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.⁵⁸

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.⁵⁹

In the case at hand, the advantage is granted to seven coal mines, which has a selective character by reserving favourable treatment for these undertakings.⁶⁰

(iv) Distortion of competition and effect on trade

The coal mines benefitting from this measure are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

⁵⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 49; ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 38.

⁵⁷ See Commission Decision of 25 September 2007, *Poland*, C(2007) 4319, para. 174.

⁵⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 40; ECT C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 52.

⁵⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

⁶⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

Bank	Raiffeisenlandesbank
IBAN	AT953200000015102825
BIC	RLNWATWW

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

B. Kosovo***(a) Support for operational costs of KEK**

Support for operational costs of KEK from the State budget potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.⁶¹ Direct support of the operational costs of a company without any obligation to pay it back, pay interest or similar would clearly not be provided by the market and therefore constitutes an advantage.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.⁶² The support at stake is given by the government (i.e. the Ministry of Finance) and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The measure at stake constitutes a direct transfer of resources from the State budget and therefore contains State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.⁶³

In the case at hand, support is granted to KEK only and is therefore selective.

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with

⁶¹ Commission Notice on the notion of State aid (2016/C 262/1) para 66; Cases C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para 60; C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, para 41.

⁶² Commission Notice on the notion of State aid (2016/C 262/1) para 39.

⁶³ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

which it competes.⁶⁴ A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.⁶⁵ KEK is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.⁶⁶ Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.⁶⁷ As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Governmental loan to KEK

The loan of EUR 191.952 mn (interest rate 2.5% over 18 years) by the Government to KEK potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.

(i) Advantage

The State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.⁶⁸ It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided a loan under the same conditions.⁶⁹ Interest-free loans,⁷⁰ loans on preferential interest terms⁷¹ or without sufficient security⁷² have been categorized as State aid.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.⁷³ The loan at issue is granted by the Government, i.e. the Ministry of Finance, and is therefore imputable to the State.

⁶⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases 730/79, *Philip Morris*, ECLI:EU:C:1980:209, para 11; T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 80.

⁶⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 141-147; C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.

⁶⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288, para 76.

⁶⁷ ECJ C-518/13, *Eventech*, ECLI:EU:C:2015:9, para 65.

⁶⁸ ECJ 67, 68 and 70/85, *Van der Kooy* [1988] ECR 219, p. 251.

⁶⁹ ECJ C-305/89, *Alfa Romeo* [1991] ECR I-1603, para. 19; T-296/97, *Alitalia I* [2000] ECR II-3871, para. 96.

⁷⁰ T-214/95, *Vlaams Gewest/Commission* [1998] ECR II-717.

⁷¹ 57/86, *Greece/Commission* [1998] ECR 2855; 63/87 *Greece/Commission* [1988] ECR 2875; 102/87, *France/Commission* [1988] ECR 4067; C-15/98 and C-105/99, *Italian Republic and Sardegna Lines/Commission* [2000] ECR I-8855.

⁷² C-457/00, *Belgium/Commission* [2002] ECR I-6931.

⁷³ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

Only advantages granted directly or indirectly through State resources can constitute State aid. The measure at stake constitutes a direct transfer of resources from the State budget and therefore contains State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.⁷⁴

In the case at hand, support is granted to KEK only and is therefore selective.

(iv) Distortion of competition and effect on trade

KEK is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(c) Forgiven accrued interest on governmental loans

The State waiving interest on governmental loans that is due to be paid by KEK potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.

(i) Advantage

As has been pointed out above, the State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.⁷⁵ Interest-free loans confer an advantage on the beneficiary.⁷⁶ Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.⁷⁷ This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.⁷⁸

⁷⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

⁷⁵ ECJ 67, 68 and 70/85, *Van der Kooy* [1988] ECR 219, p. 251.

⁷⁶ 57/86, *Greece/Commission* [1988] ECR 2855; T-55/99, *CETM/Commission* [2000] ECR II-3207; C-114/00, *Spain/Commission* [2002] ECR I-7657; T-214/95, *Vlaams Gewest*, ECLI:EU:T:1998:77.

⁷⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

⁷⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 68; ECJ C-172/03, *Heiser*, ECLI:EU:C:2005:130, para 36; ECJ C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598 para 38; ECJ C-126/01, *GEMO*, ECLI:EU:C:2003:622, para 28.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.⁷⁹ The support at issue is granted by the Government, i.e. the Ministry of Finance, and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The interest on governmental loans is due to the State budget; therefore the measure at stake constitutes a transfer of resources from the State budget and therefore contains State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.⁸⁰

In the case at hand, support is granted to KEK only and is therefore selective.

(iv) Distortion of competition and effect on trade

KEK is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(d) State guarantee for loan to Energy Cleanup and Land Reclamation Project

The State guarantee provided by the Ministry of Finance for a loan by the International Development Agency/World Bank (at an interest rate of 2% over 20 years) to KEK for the Energy Cleanup and Land Reclamation Project potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.⁸¹ In the same way as any other

⁷⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

⁸⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

⁸¹ Commission Notice on the notion of State aid (2016/C 262/1) para 66; Cases C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para 60; C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, para 41.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.⁸² Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.⁸³ This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.⁸⁴

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.⁸⁵ The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.⁸⁶

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.⁸⁷ In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:⁸⁸

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).
- A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

⁸² Commission Notice on the notion of State aid (2016/C 262/1) para 108.

⁸³ Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, *France v Commission*, ECLI:EU:C:2014:217, para 96.

⁸⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 109; C-275/10, *Residex Capital v Gemeente Rotterdam*, ECLI:EU:C:2011:814, para 39.

⁸⁵ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

⁸⁶ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

⁸⁷ Case C-482/99, *France v Commission (Stardust)*, ECLI:EU:C:2002:294.

⁸⁸ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.⁸⁹ The guarantee at stake is given by the government (i.e. the Ministry of Finance) and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources.⁹⁰ The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient.⁹¹ Therefore, the guarantee at issue involves State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.⁹²

The guarantee at issue is granted in favour of KEK, i.e. it guarantees performance and payment of specific obligations of KEK. KEK benefit from the guarantee insofar as it allows it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantee favours specific undertakings.

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.⁹³ A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.⁹⁴ KEK is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

⁸⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

⁹⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 51; Case C-83/98 P, *France v Ladbroke Racing Ltd and Commission*, ECLI:EU:C:2000:248, para 48-51.

⁹¹ Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, *Ecotrade*, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, para 137, 138 and 139.

⁹² Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

⁹³ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases 730/79, *Philip Morris*, ECLI:EU:C:1980:209, para 11; T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 80.

⁹⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 141-147; C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.⁹⁵ Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.⁹⁶ As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

⁹⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288, para 76.

⁹⁶ ECJ C-518/13, *Eventech*, ECLI:EU:C:2015:9, para 65.

Bank	Raiffeisenlandesbank
IBAN	AT953200000015102825
BIC	RLNWATWW

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

C. Montenegro

(a) Failure to collect tax and social contribution arrears

The failure of Montenegro to collect tax and social security contribution arrears from Pljevlja coal mine, but to reprogramme them with 2017 as starting date, potentially constitutes State aid and should be scrutinized by the national State aid authority, the State Aid Commission.⁹⁷

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.⁹⁸ This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.⁹⁹

As reported by the Study, the tax administration of Montenegro fails to collect tax and social security contribution arrears, but reprogrammed them to start in 2017. Tax and social security contributions constitute charges normally included in the budget of an undertaking. In the case at hand, Pljevlja is effectively required to pay these charges, but at a later date, which in essence constitutes an interest-free loan for the time of postponement. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.¹⁰⁰ In the case at hand, the decision not to collect the arrears must be taken by the authority responsible for the collection which is the Tax Administration of Montenegro and/or the Ministry of Finance. These authorities are part of the State's administration and their measures are therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.¹⁰¹ Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.¹⁰² For example, as in the case at hand, a 'shortfall' in tax and social security revenue due to exemptions or postponement in taxes or social security contributions granted by the State fulfils the State resources requirement.¹⁰³

⁹⁷ http://www.rupv.me/sites/rupv.me/files/2016_-_izvjestaj_revizora_za_rudnik_uglja_pv.pdf

⁹⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

⁹⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 68; ECJ C-172/03, *Heiser*, ECLI:EU:C:2005:130, para 36; ECJ C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598 para 38; ECJ C-126/01, *GEMO*, ECLI:EU:C:2003:622, para 28.

¹⁰⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

¹⁰¹ Commission Notice on the notion of State aid (2016/C 262/1) para 51.

¹⁰² ECJ C-83/98 P, *Ladbroke Racing*, ECLI:EU:C:2000:248 paras 48-51.

¹⁰³ ECJ C-387/92, *Banko Exterior de Espana*, ECLI:EU:C:1994:100, para 14.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.¹⁰⁴ There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,¹⁰⁵ but in the case at hand, the measure benefits Pljevlja, one coal mine, which has a selective character by reserving favourable treatment for this undertaking.¹⁰⁶

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.¹⁰⁷ A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.¹⁰⁸ The coal mine benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.¹⁰⁹ Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.¹¹⁰ As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Governmental guarantee for KfW loan for filter replacement

The governmental guarantee issued by the Ministry of Finance for a loan by KfW to EPCG for EUR 10 mn for filter replacement at TPP Pljevlja¹¹¹ potentially constitutes State aid and should be scrutinized by the national State aid authority, the Agency for Competition Protection.

¹⁰⁴ ECJ C-15/14 P, *MOL*, ECLI:EU:C:2015:362 para 60.

¹⁰⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 127.

¹⁰⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

¹⁰⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases 730/79, *Philip Morris*, ECLI:EU:C:1980:209, para 11; T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 80.

¹⁰⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 141-147; C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.

¹⁰⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288, para 76.

¹¹⁰ ECJ C-518/13, *Eventech*, ECLI:EU:C:2015:9, para 65.

¹¹¹ https://www.epcg.com/sites/epcg.com/files/prilog_1_finansijski_izvjestaji_epcg_sa_misljenjem_revizora-2016-mne_1.12.2017.pdf

Bank	Raiffeisenlandesbank
IBAN	AT95320000015102825
BIC	RLNWATWW

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.¹¹² In the same way as any other transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.¹¹³ Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.¹¹⁴ This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.¹¹⁵

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.¹¹⁶ The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.¹¹⁷

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.¹¹⁸ In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:¹¹⁹

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).

¹¹² Commission Notice on the notion of State aid (2016/C 262/1) para 66; Cases C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para 60; C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, para 41.

¹¹³ Commission Notice on the notion of State aid (2016/C 262/1) para 108.

¹¹⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, *France v Commission*, ECLI:EU:C:2014:217, para 96.

¹¹⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 109; C-275/10, *Residex Capital v Gemeente Rotterdam*, ECLI:EU:C:2011:814, para 39.

¹¹⁶ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

¹¹⁷ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

¹¹⁸ Case C-482/99, *France v Commission (Stardust)*, ECLI:EU:C:2002:294.

¹¹⁹ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

- A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.¹²⁰ The guarantee at stake is given by the government (i.e. the Ministry of Finance) and are therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources.¹²¹ The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient.¹²² Therefore, the guarantee at issue involves State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.¹²³

The guarantee at issue is granted in favour of one TPP, i.e. it guarantees performance and payment of specific obligations of the operator. The operator benefits from the guarantee insofar as it allows it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantee favours a specific undertaking.

(iv) Distortion of competition and effect on trade

The TPP benefitting from this measure is active in the generation of electricity, a market which is open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

¹²⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

¹²¹ Commission Notice on the notion of State aid (2016/C 262/1) para 51; Case C-83/98 P, *France v Ladbroke Racing Ltd and Commission*, ECLI:EU:C:2000:248, para 48-51.

¹²² Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, *Ecotrade*, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, para 137, 138 and 139.

¹²³ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(c) Electricity debt of Pljevlja

EPCG not claiming and enforcing any debts for electricity provided to the Pljevlja coal mine potentially constitutes State aid and should be scrutinized by the national State aid authority, the Agency for Competition Protection.

(i) Advantage

As has been pointed out above, not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.¹²⁴

Paying for products delivered and services rendered constitutes charges normally included in the budget of an undertaking. In the case at hand, Pljevlja is owing remuneration for the electricity provided to it by EPCG, but this obligation is not enforced, which in essence constitutes provision of electricity for free. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

The resources of States or of their dependent or independent, national, regional or local public institutions (“public authorities”) as well as the resources of undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence (“public undertakings”), are to be seen as State resources.¹²⁵ Since the State is capable of directing the use of the company’s resources, they are under the control of the State¹²⁶ and can be considered State resources.¹²⁷

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.¹²⁸ There is no need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question; the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.¹²⁹ Possible indicators include for example:¹³⁰

- The fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;

¹²⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

¹²⁵ E.g. Case C-482/99, *Stardust Marine*, EU:C:2002:294, paras. 34 *et seqq*; 248//84, *Germany/Commission*, [1987] ECR-4013, para. 17.

¹²⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 49; ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 38.

¹²⁷ See Commission Decision of 25 September 2007, *Poland*, C(2007) 4319, para. 174.

¹²⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 40; ECT C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 52.

¹²⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 41 *et seq*.

¹³⁰ ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294 para 55 *et seq*.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

- The fact that the undertaking through which the aid was granted had to take account of directives issued by governmental bodies;¹³¹
- The integration of the public undertaking into the structures of the public administration;
- The degree of supervision that the public authorities exercise over the management of the undertaking;
- Any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.¹³² There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,¹³³ but in the case at hand, the measure benefits Pljevlja, one coal mine, which has a selective character by reserving favourable treatment for this undertaking.¹³⁴

(iv) Distortion of competition and effect on trade

The coal mine benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

¹³¹ ECJ C-242/13, *Commerz Nederland*, ECLI:EU:C:2014:2224, para 35.

¹³² ECJ C-15/14 P, *MOL*, ECLI:EU:C:2015:362 para 60.

¹³³ Commission Notice on the notion of State aid (2016/C 262/1) para 127.

¹³⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

D. North Macedonia

The measures identified by the Study are all guarantees provided by the State, i.e. the Ministry of Finance, for loans granted by either Deutsche Bank or Stopanska banka to ELEM, Elektrani na Makedonija, the state-owned electricity producer, for the modernization of TPP Bitola and its boiler units as well as delivery, construction and putting into operation of the main conveyor belt system from Brod Geotino to Suvodol.

The guarantees potentially constitute State aid and should be scrutinized by the national State aid authority, the Commission for Protection of Competition.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.¹³⁵ In the same way as any other transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.¹³⁶ Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.¹³⁷ This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.¹³⁸

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.¹³⁹ The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.¹⁴⁰

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.¹⁴¹ In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a

¹³⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 66; Cases C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para 60; C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, para 41.

¹³⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 108.

¹³⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, *France v Commission*, ECLI:EU:C:2014:217, para 96.

¹³⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 109; C-275/10, *Residex Capital v Gemeente Rotterdam*, ECLI:EU:C:2011:814, para 39.

¹³⁹ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

¹⁴⁰ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

¹⁴¹ Case C-482/99, *France v Commission (Stardust)*, ECLI:EU:C:2002:294.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

given guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:¹⁴²

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).
- A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.¹⁴³ The guarantees at stake are given by the government (i.e. the Ministry of Finance) and are therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources.¹⁴⁴ The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient.¹⁴⁵ Therefore, the guarantees at issue involve State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such

¹⁴² Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.

¹⁴³ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

¹⁴⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 51; Case C-83/98 P, *France v Ladbroke Racing Ltd and Commission*, ECLI:EU:C:2000:248, para 48-51.

¹⁴⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, *Ecotrade*, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, para 137, 138 and 139.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

measures have a selective character, as they reserve favourable treatment for one or a few undertakings.¹⁴⁶

The guarantees at issue are granted in favour of ELEM, i.e. it guarantees performance and payment of specific obligations of ELEM. ELEM benefits from the guarantees insofar as they allow it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantees favour a specific undertaking.

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.¹⁴⁷ A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.¹⁴⁸ ELEM is active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.¹⁴⁹ Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.¹⁵⁰ As there is substantial cross-border trade in electricity, the guarantees are also capable of affecting trade in Network Energy between the Contracting Parties.

¹⁴⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

¹⁴⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases 730/79, *Philip Morris*, ECLI:EU:C:1980:209, para 11; T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 80.

¹⁴⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 141-147; C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.

¹⁴⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288, para 76.

¹⁵⁰ ECJ C-518/13, *Eventech*, ECLI:EU:C:2015:9, para 65.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

E. Serbia

(a) Direct grants for coal mines and filters

Direct grants from the State's budget to underground coal mines of JP PEU Resavica¹⁵¹ and to TPP Nikola Tesla (TENT) of JP EPS Belgrade (for filters)¹⁵² potentially constitute State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.¹⁵³ Direct support of the operational costs of a company without any obligation to pay it back, pay interest or similar would clearly not be provided by the market and therefore constitutes an advantage.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.¹⁵⁴ The support at stake is given by the government and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The measure at stake constitutes a direct transfer of resources from the State budget and therefore contains State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.¹⁵⁵

In the case at hand, support is granted to JP PEU Resavica and to TPP Nikola Tesla (TENT) of JP EPS Belgrade only and is therefore selective.

¹⁵¹ <http://www.jppeu.rs/informator.html>

¹⁵²

<http://www.eps.rs/SiteAssets/Lists/Sitemap/EditForm/izvestajiposlovanju/finansijski/Finansijski%20izve%C5%A1taji%20za%202016.%20godinu%20i%20Izve%C5%A1taj%20nezavisnog%20revizora/JP%20EPS%20pojedina%20potpisan.pdf>

¹⁵³ Commission Notice on the notion of State aid (2016/C 262/1) para 66; Cases C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para 60; C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, para 41.

¹⁵⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

¹⁵⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.¹⁵⁶ A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.¹⁵⁷ JP PEU Resavica and to TPP Nikola Tesla (TENT) of JP EPS Belgrade are active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.¹⁵⁸ Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.¹⁵⁹ As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Failure to collect tax, social security contribution and VAT arrears

The failure by Serbia to collect tax and social security contribution arrears as well as other public revenues from JP PEU Resavica¹⁶⁰ or to reprogramme them¹⁶¹ potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.¹⁶² This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.¹⁶³

Tax, social security contribution and public expenditures constitute charges normally included in the budget of an undertaking. In fact, in this case, JP PEU Resavica may be required to pay these charges, but the obligation is not enforced and, therefore, it is released from the duty to pay the

¹⁵⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases 730/79, *Philip Morris*, ECLI:EU:C:1980:209, para 11; T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 80.

¹⁵⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 141-147; C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.

¹⁵⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288, para 76.

¹⁵⁹ ECJ C-518/13, *Eventech*, ECLI:EU:C:2015:9, para 65.

¹⁶⁰ <http://www.jppeu.rs/informator.html>

¹⁶¹ <http://www.jppeu.rs/informator.html>

¹⁶² Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

¹⁶³ Commission Notice on the notion of State aid (2016/C 262/1) para 68; ECJ C-172/03, *Heiser*, ECLI:EU:C:2005:130, para 36; ECJ C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598 para 38; ECJ C-126/01, *GEMO*, ECLI:EU:C:2003:622, para 28.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

arrears. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.¹⁶⁴ In the case at hand, the decision not to collect the arrears must be taken by the authority responsible for the collection which is the tax administration. It is part of the State's administration and its measures are therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.¹⁶⁵ Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.¹⁶⁶ For example, as in the case at hand, a 'shortfall' in tax, social security and other public revenue due granted by the State fulfils the State resources requirement.¹⁶⁷

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.¹⁶⁸ There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,¹⁶⁹ but in the case at hand, the exemption is an *ad hoc* measure benefitting JP PEU Resavica, which has a selective character by reserving favourable treatment for this undertaking.¹⁷⁰

(iv) Distortion of competition and effect on trade

JP PEU Resavica benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

¹⁶⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

¹⁶⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 51.

¹⁶⁶ ECJ C-83/98 P, *Ladbroke Racing*, ECLI:EU:C:2000:248 paras 48-51.

¹⁶⁷ ECJ C-387/92, *Banko Exterior de Espana*, ECLI:EU:C:1994:100, para 14.

¹⁶⁸ ECJ C-15/14 P, *MOL*, ECLI:EU:C:2015:362 para 60.

¹⁶⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 127.

¹⁷⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(c) Debt write-off

Partial write-off of a governmental loan granted by the government to JP EPS Belgrade¹⁷¹ potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.¹⁷² This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.¹⁷³

Although a loan by the government may be granted on market terms and therefore not confer any advantage to the beneficiary, writing-off such loan effectively amounts to a direct grant by the government. This therefore constitutes an economic advantage.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.¹⁷⁴ In the case at hand, the decision to write-off a governmental loan must be taken by the authority granting the loan. It is part of the State and its measure is therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.¹⁷⁵ Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.¹⁷⁶ For example, as in the case at hand, writing-off a loan and therefore foregoing the sum that was due to be repaid under the loan fulfils the State resources requirement.

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.¹⁷⁷ In the case at hand, the writing-off is an *ad hoc*

¹⁷¹ <http://www.eps.rs/Documents/JP%20EPS%20izvestaj%202017.pdf>

¹⁷² Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

¹⁷³ Commission Notice on the notion of State aid (2016/C 262/1) para 68; ECJ C-172/03, *Heiser*, ECLI:EU:C:2005:130, para 36; ECJ C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598 para 38; ECJ C-126/01, *GEMO*, ECLI:EU:C:2003:622, para 28.

¹⁷⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

¹⁷⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 51.

¹⁷⁶ ECJ C-83/98 P, *Ladbroke Racing*, ECLI:EU:C:2000:248 paras 48-51.

¹⁷⁷ ECJ C-15/14 P, *MOL*, ECLI:EU:C:2015:362 para 60.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

measure benefitting JP EPS Belgrade, which has a selective character by reserving favourable treatment for this undertaking.¹⁷⁸

(iv) Distortion of competition and effect on trade

JP EPS Belgrade benefitting from this measure is active in the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(d) Governmental loan to JP PEU Resavica

Granting a loan to JP PEU Resavica¹⁷⁹ potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

The State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.¹⁸⁰ It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount and under the same conditions.¹⁸¹ The assessment whether a private investor would have entered into the transaction on the same terms will vary from case to case and needs to take into account all factors that are relevant to the transaction and its context. This includes the situation of the beneficiary undertaking and the relevant market, the liquidity of the capital, a comparison between the internal rate of return on the investment and the minimum acceptable rate for a private investor. In particular, a loan without an obligation

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.¹⁸² In the case at hand, the loan is granted by the government and is therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.¹⁸³ Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State

¹⁷⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

¹⁷⁹

<http://www.jppeu.rs/dokumenti/lzvestaj%20revizora%20i%20set%20redovnih%20finansijskih%20izvestaja%20za%202017.%20godinu.pdf>; <http://www.jppeu.rs/informator.html>.

¹⁸⁰ ECJ 67, 68 and 70/85, *Van der Kooy* [1988] ECR 219, p. 251.

¹⁸¹ ECJ C-305/89, *Alfa Romeo* [1991] ECR I-1603, para. 19; T-296/97, *Alitalia I* [2000] ECR II-3871, para. 96.

¹⁸² Commission Notice on the notion of State aid (2016/C 262/1) para 39.

¹⁸³ Commission Notice on the notion of State aid (2016/C 262/1) para 51.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

resources.¹⁸⁴ For example, as in the case at hand, granting a loan on terms that are more favourable than market-terms would fulfill the State resources requirement.

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.¹⁸⁵ The governmental loan is an *ad hoc* measure benefitting JP PEU Resavica, which has a selective character by reserving favourable treatment for this undertaking.¹⁸⁶

(iv) Distortion of competition and effect on trade

JP PEU Resavica benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(e) State guarantees

Guarantees provided by the Ministry of Finance for (i) a loan of EUR 213 mn by JICA ODA to JP EPS Belgrade for TPP Nikola Tesla,¹⁸⁷ (ii) a loan of EUR 157 mn by China Exim Bank to JP EPS Belgrade for TPP Kostolac B,¹⁸⁸ (iii) a loan of EUR 80 mn by EBRD to JP EPS Belgrade for Kolubara's BTO system,¹⁸⁹ (iv) a loan of EUR 200 mn by EBRD to JP EPS Belgrade for EPS Contruction Project,¹⁹⁰ (v) a loan of EUR 65 mn by KfW to JP EPS Belgrade for Kolubara B and C,¹⁹¹ (vi) a loan of EUR 157 mn by IBRD to JP EPS Belgrade for Emergency flood recovery project,¹⁹² (vii) a loan of EUR 45 mn by KfW to JP EPS Belgrade for TPP Nikola Tesla,¹⁹³ and (viii) a loan of EUR 529 mn by China Exim Bank to JP EPS Belgrade for Kostolac B¹⁹⁴ potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

¹⁸⁴ ECJ C-83/98 P, *Ladbroke Racing*, ECLI:EU:C:2000:248 paras 48-51.

¹⁸⁵ ECJ C-15/14 P, *MOL*, ECLI:EU:C:2015:362 para 60.

¹⁸⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

¹⁸⁷ <https://www.reuters.com/article/us-serbia-energy-cleanup/serbias-largest-power-plant-to-start-clean-up-to-meet-eu-standards-idUSKCN1BJ1ZI>

¹⁸⁸

http://www.eps.rs/SiteAssets/Lists/Sitemap/EditForm/izvestajiposlovanju/godisnjiizvestaji/Godisnji%20izvestaj%202015_%20srpski.pdf

http://www.eps.rs/SiteAssets/Lists/Sitemap/EditForm/izvestajiposlovanju/godisnjiizvestaji/Godisnji%20izvestaj%202015_%20srpski.pdf

¹⁹⁰ <http://www.eps.rs/Documents/JP%20EPS%20izvestaj%202017.pdf>

¹⁹¹ <http://www.eps.rs/Documents/JP%20EPS%20izvestaj%202017.pdf>

¹⁹² <http://www.eps.rs/Documents/JP%20EPS%20izvestaj%202017.pdf>

¹⁹³ <http://www.eps.rs/Documents/JP%20EPS%20izvestaj%202017.pdf>

¹⁹⁴

http://www.eps.rs/SiteAssets/Lists/Sitemap/EditForm/izvestajiposlovanju/godisnjiizvestaji/Godisnji%20izvestaj%202015_%20srpski.pdf

Bank	Raiffeisenlandesbank
IBAN	AT95320000015102825
BIC	RLNWATWW

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.¹⁹⁵ In the same way as any other transaction, guarantees granted by public bodies may entail State aid if they are not in line with market terms.¹⁹⁶ Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the beneficiary, confers an advantage on the latter.¹⁹⁷ This is because it enables the beneficiary to enter into a commercial transaction at all or at better conditions and terms than would have been obtainable on the market without the guarantee.¹⁹⁸

The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State.¹⁹⁹ The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.²⁰⁰

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the European Court of Justice has confirmed that the European Commission should base its assessment on the principle of an investor operating in a market economy.²⁰¹ In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the European Commission sets out in a Notice a number of sufficient conditions for the absence of aid:²⁰²

- The borrower is not in financial difficulty, as defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty.
- The extent of the guarantee can be properly measured when it is granted, i.e. it is linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- The guarantee does not cover more than 80% of the outstanding loan or other financial obligation (except in case of a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest).

¹⁹⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 66; Cases C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para 60; C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, para 41.

¹⁹⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 108.

¹⁹⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 110; Case C-559/12 P, *France v Commission*, ECLI:EU:C:2014:217, para 96.

¹⁹⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 109; C-275/10, *Residex Capital v Gemeente Rotterdam*, ECLI:EU:C:2011:814, para 39.

¹⁹⁹ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

²⁰⁰ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 2.1.

²⁰¹ Case C-482/99, *France v Commission (Stardust)*, ECLI:EU:C:2002:294.

²⁰² Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/2) 3.1.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

- A market-oriented price is paid for the guarantee, i.e. the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.²⁰³ The guarantees at stake are given by the government (i.e. the Ministry of Finance) and are therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. Waiving revenue which would otherwise have been paid to the state constitutes a transfer of State resources.²⁰⁴ The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient.²⁰⁵ Therefore, the guarantees at issue involve State resources.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.²⁰⁶

The guarantees at issue are each granted in favour of one particular TPP, i.e. it guarantees performance and payment of specific obligations of the operator. The operator benefits from the guarantee insofar as it allows it to get a loan or at least at better terms than would have been the case without a guarantee. Therefore, the guarantees each favour a specific undertaking.

(iv) Distortion of competition and effect on trade

The beneficiaries of these guarantees are active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

²⁰³ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

²⁰⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 51; Case C-83/98 P, *France v Ladbroke Racing Ltd and Commission*, ECLI:EU:C:2000:248, para 48-51.

²⁰⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 51; Cases C-200/97, *Ecotrade*, ECLI:EU:C:1998:579, para 41; C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, para 137, 138 and 139.

²⁰⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(f) Loan by JP EPS Belgrade to JP PEU Resavica

Granting of a loan by JP EPS Belgrade to JP PEU Resavica²⁰⁷ potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

As pointed out above, the State may lend money, but when it does so to an extent or on terms which would not be acceptable to the commercial investor, it is granting State aid.²⁰⁸ It is therefore necessary to consider whether, in similar circumstances, a private investor of a size comparable to the public body in question would have provided capital of such an amount and under the same conditions.²⁰⁹

(ii) Imputability to the State and State resources

The resources of States or of their dependent or independent, national, regional or local public institutions (“public authorities”) as well as the resources of undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence (“public undertakings”), are to be seen as State resources.²¹⁰ The loan is granted by JP EPS Belgrade, a state-owned company. Since the State is capable of directing the use of the company’s resources, they are under the control of the State²¹¹ and can be considered State resources.²¹²

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.²¹³ There is no need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question; the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.²¹⁴ Possible indicators include for example:²¹⁵

- The fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;
- The fact that the undertaking through which the aid was granted had to take account of directives issued by governmental bodies;²¹⁶
- The integration of the public undertaking into the structures of the public administration;

²⁰⁷ <http://www.jppeu.rs/informator.html>

²⁰⁸ ECJ 67, 68 and 70/85, *Van der Kooy* [1988] ECR 219, p. 251.

²⁰⁹ ECJ C-305/89, *Alfa Romeo* [1991] ECR I-1603, para. 19; T-296/97, *Alitalia I* [2000] ECR II-3871, para. 96.

²¹⁰ E.g. Case C-482/99, *Stardust Marine*, EU:C:2002:294, paras. 34 *et seq*; 248/84, *Germany/Commission*, [1987] ECR-4013, para. 17.

²¹¹ Commission Notice on the notion of State aid (2016/C 262/1) para 49; ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 38.

²¹² See Commission Decision of 25 September 2007, *Poland*, C(2007) 4319, para. 174.

²¹³ Commission Notice on the notion of State aid (2016/C 262/1) para 40; ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 52.

²¹⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 41 *et seq*.

²¹⁵ ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294 para 55 *et seq*.

²¹⁶ ECJ C-242/13, *Commerz Nederland*, ECLI:EU:C:2014:2224, para 35.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

- The degree of supervision that the public authorities exercise over the management of the undertaking;
- Any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified, it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.²¹⁷

In the case at hand, a loan is granted to one company, which has a selective character by reserving favourable treatment for this undertaking.

(iv) Distortion of competition and effect on trade

JP PEU Resavica benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(g) Electricity debt of JP PEU Resavica

JP EPS Belgrade not claiming and enforcing any debts for electricity provided to the JP PEU Resavica²¹⁸ potentially constitutes State aid and should be scrutinized by the national State aid authority, the Commission for State Aid Control.

(i) Advantage

As has been pointed out above, not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.²¹⁹

Paying for products delivered and services rendered constitutes charges normally included in the budget of an undertaking. In the case at hand, Resavica is owing remuneration for the electricity provided to it by EPS, but this obligation is not enforced, which in essence constitutes provision of

²¹⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

²¹⁸ <http://www.jppeu.rs/dokumenti/Izvestaj%20revizora%20i%20set%20redovnih%20finansijskih%20izvestaja%20za%202017.%20godinu.pdf>

²¹⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

electricity for free. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

The advantage is granted by JP EPS Belgrade, a state-owned company. Since the State is capable of directing the use of the company's resources, they are under the control of the State²²⁰ and can be considered State resources.²²¹

In cases of the advantage being granted through public undertakings, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.²²²

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.²²³ There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,²²⁴ but in the case at hand, the measure benefits Resavica, one coal mine, which has a selective character by reserving favourable treatment for this undertaking.²²⁵

(iv) Distortion of competition and effect on trade

The coal mine benefitting from this measure is active in the exploration and provision of coal for the generation of electricity, markets which are open to competition.

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

²²⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 49; ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 38.

²²¹ See Commission Decision of 25 September 2007, *Poland*, C(2007) 4319, para. 174.

²²² Commission Notice on the notion of State aid (2016/C 262/1) para 40; ECJ C-482/99, *Stardust*, ECLI:EU:C:2002:294, para 52.

²²³ ECJ C-15/14 P, *MOL*, ECLI:EU:C:2015:362 para 60.

²²⁴ Commission Notice on the notion of State aid (2016/C 262/1) para 127.

²²⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

F. Ukraine

(a) Direct grants for mining industry

Direct grants from the State's budget to state coal mines for (i) the restructuring of the coal and peat industry,²²⁶ (ii) rescue measures at coal mining enterprises,²²⁷ (iii) partial compensation of production costs of finished marketable coal,²²⁸ (iv) improving safety measures at mining enterprises,²²⁹ (v) replenishing of current capital or increasing the statutory funds of coal mines to settle the arrears of wages to employees,²³⁰ (vi) construction of mine No. 10 "Novovolynska",²³¹ (vii) preventing emergency situations due to flooding of the mines of Pervomaysko-Stakhaiv coal mining region,²³² (viii) payment for Loan Lisichanskvugilya PJSC and the State Development Bank of PRC,²³³ and (ix) repairs of TPP²³⁴ potentially constitute State aid and should be scrutinized by the national State aid authority, the Antimonopoly Committee of Ukraine.

(i) Advantage

An advantage is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.²³⁵ Direct support of the operational or investment costs of a company without any obligation to pay it back, pay interest or similar would clearly not be provided by the market and therefore constitutes an advantage.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.²³⁶ The support at stake is given by the Ministry of Energy and Coal Industry and is therefore imputable to the State.

Only advantages granted directly or indirectly through State resources can constitute State aid. The measures at stake constitute a direct transfer of resources from the State budget and therefore contains State resources.

²²⁶ <http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146477>

²²⁷ <http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146478>

²²⁸ <http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146479>

²²⁹ <http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146480>

²³⁰ <http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146482>

²³¹ <http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146483>

²³² <http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146484>

²³³ <http://www.treasury.gov.ua/main/uk/doccatalog/list?currDir=146486>

²³⁴ <http://www.centrenerg.com/ru/shareholders/reports/>

²³⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 66; Cases C-39/94, *SFEI and Others*, ECLI:EU:C:1996:285, para 60; C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, para 41.

²³⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(iii) Selectivity

When States adopt *ad hoc* positive measures benefiting one or more identified undertakings (for instance, granting money to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.²³⁷

In the case at hand, support is granted to specific projects only and is therefore selective.

(iv) Distortion of competition and effect on trade

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the beneficiary compared to other undertakings with which it competes.²³⁸ A distortion of competition is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.²³⁹ The beneficiaries are active in the exploration and provision of coal for the generation of electricity, markets which would be open to competition.

It is not necessary to establish that the aid has an actual effect on trade between Contracting Parties but only whether the aid is liable to affect such trade.²⁴⁰ Where the State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, trade must be regarded as affected by the aid.²⁴¹ As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.

(b) Failure to collect tax, social security contribution and VAT arrears

The failure by Ukraine to collect tax, social security contribution arrears and VAT²⁴² from state coal mines²⁴³ and Centrenerg²⁴⁴ potentially constitutes State aid and should be scrutinized by the national State aid authority, the Antimonopoly Committee of Ukraine.

²³⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 126; Case C-15/14 P, *Commission v MOL*, ECLI:EU:C:2015:362, para 60 et seq.; Opinion of Advocate General Mengozzi in C-284/12, *Deutsche Lufthansa*, ECLI:EU:C:2013:442, para 52.

²³⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases 730/79, *Philip Morris*, ECLI:EU:C:1980:209, para 11; T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 80.

²³⁹ Commission Notice on the notion of State aid (2016/C 262/1) para 187; Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, para 141-147; C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.

²⁴⁰ Commission Notice on the notion of State aid (2016/C 262/1) para 190; Cases C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 65; C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288, para 76.

²⁴¹ ECJ C-518/13, *Eventech*, ECLI:EU:C:2015:9, para 65.

²⁴² http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64598

²⁴³ <http://sfs.gov.ua/dovidniki--reestri--perelik/pereliki-/296361.html>

²⁴⁴ <http://sfs.gov.ua/dovidniki--reestri--perelik/pereliki-/296361.html>

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(i) Advantage

The concept of aid is more general than that of a subsidy. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage.²⁴⁵ This comprises any mitigation of charges normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect as them.²⁴⁶

Tax, social security contribution and VAT constitute charges normally included in the budget of an undertaking. In fact, in this case, state coal mines and Centrenergó may be required to pay these charges, but the obligation is not enforced and, therefore, it is released from the duty to pay the arrears. This effectively amounts to an economic advantage by mitigating the charges normally incurred by an undertaking.

(ii) Imputability to the State and State resources

In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State.²⁴⁷ In the case at hand, the decision not to collect the arrears must be taken by the authority responsible for the collection which is the tax administration. It is part of the State's administration and its measures are therefore imputable to the State.

State aid does not require a positive transfer of funds; foregoing State revenue is sufficient.²⁴⁸ Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources.²⁴⁹ For example, as in the case at hand, a 'shortfall' in tax, social security contributions and VAT due granted by the State fulfils the State resources requirement.²⁵⁰

(iii) Selectivity

In case of an individual aid, the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective.²⁵¹ There is no broader measure applicable to all undertakings fulfilling certain criteria which mitigates the charges that those undertakings would normally have to bear,²⁵² but in the case at hand, the exemption is an *ad hoc* measure benefitting state coal mines and Centrenergó, which has a selective character by reserving favourable treatment for these undertakings.²⁵³ The exemption from VAT applies to TPPs and therefore favours TPPs compared to other electricity generators.

²⁴⁵ Commission Notice on the notion of State aid (2016/C 262/1) para 68, explicitly referring to tax advantages in footnote 105.

²⁴⁶ Commission Notice on the notion of State aid (2016/C 262/1) para 68; ECJ C-172/03, *Heiser*, ECLI:EU:C:2005:130, para 36; ECJ C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598 para 38; ECJ C-126/01, *GEMO*, ECLI:EU:C:2003:622, para 28.

²⁴⁷ Commission Notice on the notion of State aid (2016/C 262/1) para 39.

²⁴⁸ Commission Notice on the notion of State aid (2016/C 262/1) para 51.

²⁴⁹ ECJ C-83/98 P, *Ladbroke Racing*, ECLI:EU:C:2000:248 paras 48-51.

²⁵⁰ ECJ C-387/92, *Banko Exterior de Espana*, ECLI:EU:C:1994:100, para 14.

²⁵¹ ECJ C-15/14 P, *MOL*, ECLI:EU:C:2015:362 para 60.

²⁵² Commission Notice on the notion of State aid (2016/C 262/1) para 127.

²⁵³ Commission Notice on the notion of State aid (2016/C 262/1) para 126.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

(iv) Distortion of competition and effect on trade

State coal mines benefitting from this measure is active in the exploration and provision of coal for the generation of electricity; Centrengo and TPPs are generating electricity, markets which are open to competition

As there is substantial cross-border trade in electricity, the State support is also capable of affecting trade in Network Energy between the Contracting Parties.